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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

Motion To Affirm

CHRISTOPHER AND BAILEY
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Pursuant to Rule 16 of the Rules of this Court (adopted June 12, effective October 2, 1967) appellee, Louis Rosenbaum, d/b/a El Paso-Los Angeles Limousine Express, intervening defendant below, moves to dismiss this appeal for the reason that the appeal presents no substantial question reviewable by this Court.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment of a three-judge district court (J.S. 1a) dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. The Court below has so succinctly, yet completely, stated the case (see

Appendix A of the Jurisdictional Statement), that any such statement here seems superfluous.

QUESTIONS PRESENTED

Appellants undertake to set up four questions. The first three merely present different factual questions on rather insignificant phases of matters considered by the Interstate Commerce Commission.

The fourth undertakes to raise a question of law which has many times been determined adversely to Appellants. No one of these is substantial.

ARGUMENT

The scope of judicial review of administrative decisions is limited and well defined by many decisions of the Courts. Certainly it does not involve, as Appellants seem to think, reconsideration by this Court, or even the Court below, of the entire matter heard by the administrative agency. If this was so, an appeal would be turned into a trial *de novo*.

A long line of landmark decisions by this Honorable Court and those below, hold that orders of the Commission should not be set aside, disturbed or modified by a Court on review, even though the Court might have reached a different conclusion, if the decision is within the scope of the Commission's statutory authority and is based upon adequate findings supported by the evidence.[1]

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[1] *U.S. vs. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-536 (1946); *Rochester Telephone Corp. vs. U.S.*, 307 U.S. 125, 139 (1939); *Virginian Ry. Co. vs. U.S.*, 272 U.S. 658, 663-666 (1926).

This has been established law for more than half a century. In *I.C.C. vs. Union Pacific Ry. Co.*, 222 U.S. 541, 547-548, this Honorable Court set forth the general principle that a court considering mixed questions of law and fact should confine itself to the ultimate question of whether the Commission acted within its statutory power. This Court held that it should not consider the expediency or wisdom of the order, or whether it would have made the same ruling. A reviewing Court should not examine the facts upon which the Commission has based its order further than for the limited purpose of determining whether the record contains substantial evidence to support the Commission's ultimate conclusions. There should be no substitution of the Court's view for that of the Commission upon matters which have been committed to the Commission's exclusive determination by the Congress, if the Commission's conclusion is supported by the record and applicable law.[2]

The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.[3]

And the question whether public convenience and necessity requires the grant of a certificate is administrative and accordingly for the Commission rather

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[2]See Also: *Carolina Scenic Coach Lines vs. U.S.*, 56 F. Supp. 801, 803-804 (1946), affirmed 323 U.S. 678; *Swayne & Hoyt, Ltd. vs. U.S.*, 300 U.S. 297, 304; *Federal Communications Com. vs. WOKO, Inc.*, 329 U.S. 223, 229; *Barrett Line, Inc. vs. U.S.*, 326 U.S. 179, 199.

[3]*Mississippi Valley Barge Lines vs. U. S.*, 292 U.S. 282, 286-287; *Southern Kansas Greyhound Lines vs. U.S.*, 134 F.Supp. 502, 506, affirmed 351 U.S. 921 (1956).

than the Courts.[4]

In *Virginian Ry. vs. United States*, 272 U.S. 658, 665-666, heretofore referred to, Mr. Justice Brandeis writing, said:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *I.C.C. vs. Union Pacific R.R. Co.*, 222 U.S. 541."

In *Interstate Commerce Commission vs. Parker*, 306 U.S. 60 at page 65, it is said:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. Powell v. United States, 300 U.S. 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. McLean Trucking Co. v. United States, 321 U.S. 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

It follows *a fortiori* that the Commission did not err, as Appellants seem to argue, about the alleged inconsistency with findings made in other proceedings before it.

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[4] *I.C.C. vs. Parker*, 326 U.S. 60; *U.S. vs. Detroit & Cleveland Nav. Co.*, 326 U.S. 236; *Alton R. Co. vs. United States*, 326 U.S. 179; *Rochester Telephone Corp. vs. U.S.*, 307 U.S. 125; *Merchants Warehouse Co. vs. U. S.*, 283 U.S. 501; *United States vs. Pierce Auto Freight Lines*, 327 U.S. 515; and innumerable others.

CONCLUSION

Appellants have failed to present an appealable question of substantial importance within the jurisdiction of this Honorable Court and the judgment of the district court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, T. S. Christopher, attorney for the intervening defendant-appellee, Louis Rosenbaum, d/b/a El Paso-Los Angeles Limousine Express, hereby certify that on the 10th day of May, 1968, I served copies of the foregoing Motion to Affirm on the several parties to this action as follows:

1. Upon the United States by mailing a copy duly addressed and postage prepaid to each of the following:

Edwin N. Griswold, the Solicitor General, Donald F. Turner, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; and Edward V. Hanrahan, United States Attorney, 219 South Dearborn Street, Chicago, Illinois 60604.

2. On the Interstate Commerce Commission by mailing a copy duly addressed and postage prepaid to each of the following:

Robert W. Ginnane, General Counsel, and Steven Kazan, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. By mailing a copy duly addressed and postage prepaid to each attorney of record for Appellants as follows:

Joseph Tuohy and Robert J. Bernard, 10 South Riverside Plaza, Chicago, Illinois 60606; D. Paul Stafford and Warren A. Goff, 315 Continental Avenue,

Dallas, Texas 75207; Drew L. Carraway, John S. Fessenden, and Richard R. Sigmon, 618 Perpetual Bldg., Washington, D. C. 20004.

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